(1)

No. 91-1983

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

BERNARD KEENER,

Petitioner,

v.

HOECHST CELANESE CORPORATION a/k/a CELANESE PLASTICS COMPANY, a/k/a CELANESE PLASTICS COMPANY, A division of CELANESE CORPORATION f/k/a CELANESE CORPORATION AND HOECHST CELANESE CHEMICAL GROUP, INC. a/k/a CHEMICAL GROUP, f/k/a CELANESE CHEMICAL COMPANY, INC. a/k/a HOECHST CELANESE CHEMICAL COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is "Garmon" pre-emption so expansive that it requires an unlawfully terminated non-union employee who worked in a non-union plant to file a charge of unfair labor practice with the NLRB simply because his after hours complaints to his personnel director about the illegal disposal of carcinogenic substances into the atmosphere were shared by and discussed with co-workers.

2. If the conduct is "arguably concerted activity" does the employee nevertheless have an independent cause of action because the "arguably concerted activity" was of peripheral concern to the NLRA.

3. If the employee's discussion with co-employees regarding the employer's commission of illegal acts is "arguably concerted activity," is the employee nevertheless able to maintain a common law cause of action against his former employer because of deep rooted state concerns in protecting employees from retaliation for refusing to commit illegal acts or inquiring about the illegality of the employer's unlawful contamination of the environment.

LIST OF PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case.

(A) Petitioner, Bernard Keener;

(B) John E. Wall, Jr., Counsel for Petitioner;

(C) Hoechst Celanese Corporation a/k/a Celanese Plastics Company, a/k/a Celanese Plastics Company, A Division of Celanese Corporation f/k/a Celanese Corporation and Hoechst Celanese Chemical Group, Inc. a/k/a Chemical Group, f/k/a Celanese Chemical Company, Inc. a/k/a Hoechst Celanese Chemical Company, Respondents;

(D) J. Joe Harris, Matthews & Branscomb, Counsel for Respondents.

John E. Wall, Jr.
ATTORNEY FOR PETITIONER,
BERNARD KEENER

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, was unreported under the provisions of its Local Rule 47.5. This unpublished opinion is printed here as Appendix D. Suit was premised on Petitioner's termination of employment with the Respondent. Petitioner, Bernard R. Keener, originally filed suit in the 44th

Judicial District Court of the State of Texas. The Respondents, Hoechst Celanese Corporation a/k/a Celanese Plastics Company, a/k/a Celanese Plastics Company, a Division of Celanese Corporation, f/k/a Celanese Corporation of America, f/k/a Celanese Corporation and Hoechst Celanese Chemical Group, Inc., a/k/a Chemical Group, f/k/a Celanese Chemical Company, Inc., a/k/a Hoechst Celanese Chemical Company (Hoechst), removed the cause of action to the United States District Court for the Northern District of Texas, Dallas Division, on the basis of federal question. Respondents thereafter moved for summary judgment on various theories. The trial court ultimately ruled that Petitioner's conduct which preceded his termination of employment, was arguably concerted activity falling under the provisions of the National Labor Relations Act and because Keener had not filed a claim of unfair labor practice with the National Labor Relations Board, his claims failed as a matter of law due to "Garmon" pre-emption.

Petitioner appealed the decision of the district court to the United States Court of Appeals for the Fifth Circuit. On March 11, 1992, the Court of Appeals for the Fifth Circuit, in its unpublished opinion, affirmed the ruling of the district court. The Fifth Circuit stated that under the Supreme Court's very broad definition of "concerted activities", Petitioner's actions were required to be pressed at first instance through the National Labor Relations Board. The Fifth Circuit did not address the exceptions to Garmon pre-emption of peripheral concern or deeply rooted state concerns regarding the protection of employees who report illegal activity or who refuse to commit illegal acts.

JURISDICTION

This petition seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit made and entered on March 11, 1992. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES PRESENTED FOR REVIEW

§ 7 of the NLRA provides in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

29 U.S.C. § 157.

§ 8(a)(1) of the Act provides in relevant part:

> It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . .

29 U.S.C. § 158(a)(1).

§ 10 of the Act provides in relevant part:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall

> not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . .

29 U.S.C. § 160(a).

STATEMENT OF THE CASE

Bernard Keener began his employ with Hoechst on October 30, 1967. Keener had been working in various clean-up and related tasks following a plant explosion, which occurred November 17, 1987. He continued this employment until June 14, 1988. On the day prior to his termination of employment, Keener and other operators at the Petitioner's premises were working in the "bag house" removing fly ash bags. Concerned that ash was being released into the atmosphere, Keener asked his supervisor, Don Elledge, if it should be done in the way it was being performed. Keener having worked there for a number of years (20+), knew that there was another available means of performing this task. On the day of the fly ash removal, one of Keener's co-workers had asked Keener, "Should we be doing this, and should we be doing it this way"? Keener suggested to Elledge, that it be performed in another way. Elledge in turn replied that it would not be done in any other manner.

One of Keener's co-workers had asked him if the fly ash was a health hazard. Keener replied that yes it was, and in fact, the fly ash probably contained heavy metals, chromium and cobalt. In fact, there was some concern among the crew about their own personal safety in working with the fly ash. Keener, having been employed by

the Defendant longer, felt that he was looked to by one or two of his co-workers to serve as a spokesman for the group; however, this was merely an assumption on Keener's part.

While driving home after work that day, Keener was covered with fly ash. After showering off at home, Keener began to realize that other than the two on-site managers, none of his supervisors who should have been concerned about the fly ash problem, even knew about it since their offices had been moved after the plant had exploded. Keener became concerned because he recalled seeing a film at work about the Resource Conservation and Recovery Act which pointed out that he, as an employee, could be fined and/or sent to jail for observing a violation to the environment and not reporting it. Keener then contacted the personnel manager, Jane McBunch, at 9:40 p.m. at her home. Keener's main concern for contacting McBunch was Keener's knowledge that the environment was being contaminated and he wanted to know who to report this to so as to satisfy his duties as an employee under the environmental statutes. Keener did not remember mentioning at any time to McBunch a concern regarding exposure to himself and/or his co-workers to the chemicals. The only concern that he voiced was his concern that the ash was going into the atmosphere. When Keener contacted McBunch about the violations of law, McBunch immediately related "Well, why don't you quit?" Keener was terminated the next day immediately upon reporting to work.

The district court determined that Keener's cause of action was arguably subject to the jurisdiction of the National Labor Relations Board and since Keener had not

filed a charge of unfair labor practice, his cause of action was pre-empted under the NLRA. The court of appeals affirmed. The decision of the court of appeals should be reversed and the cause remanded for trial on the merits.

REASONS FOR GRANTING THE WRIT

1. If the definition is so broad, then the only employee complaints which would not be pressed through the NLRB are those held by deaf-mutes who do not know sign language.

In affirming the trial court, the court of appeals stated the following reason:

> Under the very broad definition that the Supreme Court has given the term "concerted activities," it is clear that Keener's activities in this case qualify. *See* Appendix D at A-22.

The appellate court in essence stated that this Court has provided such a broad definition of "concerted activity" that an individual in a non-union shop who is terminated after informing management about illegal working conditions, must seek a remedy through the National Labor Relations Board. Apparently Keener had "arguably" participated in "concerted activity" by merely having previously discussed the complaint with co-workers, who were similarly concerned about the safety of their work and the legality of the operation. The situation was discussed with Keener because he was a long term employee who might provide insight. Because few work place complaints are not deserving of at least a cursory discussion among co-workers and all generally are discussed to

analyze the concern for validity, such a broad definition would necessarily require all employee terminations following discussions of violations of the law to be presented to the NLRB. The only possible exception would be concerns held by deaf-mutes who do not know sign language and therefore couldn't communicate.

Under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773, 780 (1959) and progeny, when an activity is "arguably " regulated by Section 7 or Section 8 of the Act, both the state and federal courts *must* defer to the Board. (*San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773, 780 (1959).)

This Court has defined the term "arguably" as requiring the party claiming pre-emption to demonstrate that the case in question is one that the Board could legally decide in that party's favor, or in other words that the argument has not been "authoritatively rejected" by the courts or the Board. *International Longshoremen's Ass'n., AFL-CIO v. Davis*, 476 U.S. 380, 90 L.Ed.2d 389, 106 S.Ct. 1904, 1914 (1986). This standard coupled with Garmon and others essentially compels the Board to hear any grievance by an employee under the guise of protection of "concerted activity," if the employee had discussed the issue or problem with any other co-workers.

This Court has repeatedly recognized that it is protection for *joint* employee action that lies at the heart of the Act. (emphasis added) *See Meyers Industries, Inc.*, 281 N.L.R.B. 882, 883 (Sept. 30, 1986). Conversely, this Court has also stated that in certain situations, an individual employee acting alone is deemed to have been involved

in "concerted activity." (emphasis added) *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984). In *City Disposal*, this Court determined that where a collective bargaining agreement is involved, the individual's action is an extension of the concerted action that produced the agreement; thereby, reconciling the requirement that there be some linkage to group employee action with the notion that an individual employee is protected under the Act when that employee asserts a right contained in a collective bargaining agreement. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. at 831-833. This expanding dichotomy will eventually innundate the NLRB and ultimately the federal courts with unfair labor practice charges because of employee discussions involving common concerns which may precede termination.

2. Such an expansive concept of "arguably concerted activity" would prohibit employers from prohibiting the discussion and comparison of salaries by employees for fear of an unfair labor practice charge.

In *Walter Brucker & Co. v. NLRB*, 273 N.L.R.B. 1306 (1984), "concerted activity" was found when a group of employees discussed a common wage complaint, and one employee refrained from making his complaint to management because he assumed that the first employee to complain would obtain the information concerning the wage dispute. The Board found concertedness even though there was no specific authorization for the first employee to represent the group and that the second employee was only "generally aware" that the first

employee would take the necessary action. *Walter Brucker & Co. v. NLRB*, 273 N.L.R.B. 1306. If this shall be the law, then every employer engaged in interstate commerce within the meaning of the NLRA had better brace themselves for a flood of unfair labor complaints if they prohibit their employees from discussing and comparing salaries.

3. Arguably concerted or not: Is anyone capable of defining the ever elusive, ephemeral enigma?

If the dichotomy of *Meyers* and *City Disposal* is not confusing enough for employer and employee alike, the following decisions just infuse more complexity into the ever elusive, ephemeral and confusing concept.

In *Mannington Mills v. NLRB*, 272 N.L.R.B. 176 (1984), a case involving an employee who threatened a work stoppage protest, the Board did *not* find "concerted activity." The Board stated that there was no evidence to show (1) that any employee had authorized or instructed the employee to make a threat; (2) that any employee had discussed the possibility of a work stoppage; or (3) that any employee was aware of and supported the employee's threat. The Board then suggested that if *any* of these facts had been present, then the threat may have been "concerted." *Meyers Industries, Inc.*, 281 N.L.R.B. at 883, citing *Mannington Mills v. NLRB*, 272 N.L.R.B. 176.

The Board has also stated that one does not have to be "specifically authorized" to speak on behalf of other employees in order to qualify for protection based on concerted activity. *Id.* at 886. A shocking example of this occurred in *Rockwell International Corp. v NLRB*, 814 F.2d

1530 (11th Cir. 1987), where during a company lecture to employees regarding radio headsets which were causing too much noise in the work place, an employee stood up and stated that she did not think that the radios were too loud. When that employee was then terminated, it was held that she had been engaged in "concerted activity," even though she had not been designated as a spokesperson, because the issue of radio noise was a common employee concern. *Id.* at 1535.

Conversely, the Fifth Circuit in *NLRB v. Esco Elevators, Inc.*, 736 F.2d 295 (5th Cir. 1984) declined to follow *City Disposal* and find concerted activity even though the terminated employee was the union president, subject to a collective bargaining agreement, who had voiced safety violations which affected employees who were subject to a collective bargaining agreement. Apparently each aggrieved employee on a case by case basis must first bark and bite at the concerted activity souffle and then gnash teeth to see if he/she has snapped at air or somehow bitten into the Board's jurisdiction. Concomitantly, each employer can hire a legal staff to handle the uncertainty of application of the Act.

Keener admits that he assumed his co-workers were possibly looking to him to find out if what they were doing was safe, although nothing of the sort was ever seriously discussed, agreed to or planned. Keener also admits that subsequent to these discussions, he spoke to Elledge, the on-site manager, to see if the method was safe or if there was some other method that could be used. Elledge never threatened termination at the time.

When Keener made the evening (9:40 p.m.) phone call to McBunch at her home, he stated that his main concern was the contamination to the environment that was occurring as a result of the method he and his co-workers had been ordered to use in cleaning up the fly ash. Keener went on to state that he was afraid he would be fined or put in jail by the EPA, if he, as an employee who was aware of violations of environmental regulations at the work place, did not report those violations. Keener did not recall even mentioning his co-workers during this conversation. Physically separated from the work place at this point, Keener was acting on his own behalf to exculpate himself from EPA criminal sanctions.

In spite of this, the lower courts held that Keener's actions are "arguably protected" under the Act. The fact that the safety of the working conditions was a common issue to both Keener's previous discussions with his co-workers, and his personal call to McBunch that evening "arguably" somehow provide the necessary link to group activity.

To characterize the "activities" in question in the present case as "arguably concerted activities," for the purposes of protection under the Act, is to essentially throw the doors of the Board wide open to virtually any disgruntled employee who happened to discuss his complaint, no matter how casually, with another employee. Such a broad interpretation of the meaning of "concerted activities" basically negates the "in concert" requirement, and is a drastic departure from the central purpose of the Act.

4. The NLRB is not a vacuum designed to inhale all state law protection afforded each state's citizens.

Even if Keener's conversations with his co-workers, and subsequent conversations with his superiors, regarding concerns about unsafe and illegal working conditions could "arguably" be considered "concerted activity" envisioned by Sections 7 and 8 of the National Labor Relations Act, the act does not pre-empt his *state law* cause of action for wrongful discharge.

The "arguably protected/arguably prohibited" method for determining whether federal labor law has pre-empted a state law cause of action was set out in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236. Under this method, the initial inquiry is whether the activity alleged to be regulated by the state is either protected or prohibited by the Act or "arguably" so protected or prohibited. *Id.* at 245. The second and important inquiry under *Garmon* is whether the activity is merely a peripheral concern of the Act or touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it can not be inferred that Congress has deprived the states of the power act. *Farmer v. United Brotherhood of Carpenters and Joiners of America, Inc.*, 430 U.S. 290, 296-297, 97 S.Ct. 1056, 1061, 51 L.Ed.2d 338 (1977), citing *San Diego Building Trades Council v. Garmon*, 359 U.S. at 243-244, 79 S.Ct. at 778-779.

In this case, Keener was terminated from his employment of 20 plus years after reporting to management unsafe and illegal working conditions, and inquiring who

to notify of this in order to exculpate *himself* from criminal sanctions. The court of appeals stated that Keener's conduct was arguably concerted activity, and that protection of concerted activity is one of the principle concerns of the Act. The court went on to hold, that "[a]ny state law claim premised upon arguably concerted activity must give way [to the Act]." Clearly, the court erred in making this conclusion. If *any* state law claim "arguably" premised on concerted activity must be presented to the NLRB, then the NLRB will soon become a vacuum which will inhale every employment right conferred upon a state's citizens.

The Fifth Circuit completely bypassed the proper method of determining whether or not this state law cause of action is pre-empted by the Act. This is particularly obvious in light of this Court's holding in *Farmer* that the *Garmon* analysis is not to be applied mechanically, but rather application of the second inquiry is to be on a case by case basis. *Farmer v. United Brotherhood of Carpenters and Joiners of America, Inc.*, 430 U.S. at 297-301, 97 S.Ct. at 1061-1064. To determine whether a cause of action which could arguably be considered an "arguably concerted activity" should be pre-empted or not, the court should balance the state's legitimate non-labor interests in regulating the activity in question against the federal government's interests in uniform labor regulation, and the likely degree to which the state regulation will interfere with those interests. *Id.* at 297-301.

The lower courts concluded Keener's cause of action was pre-empted because he was engaged in arguably concerted activity and did not file an unfair labor practice

charge with the NLRB. Even if Keener were engaged in concerted activity, "Garmon" preemption does not apply.

The Fifth Circuit reasoned that because Keener's activity or conduct was arguably concerted activity, "*any* state law claim . . . must give way" (emphasis added). This analysis other than the flawed assumption of concerted activity, failed to recognize the exceptions to *Garmon* pre-emption.

5. The states of this Republic can provide their citizens employment rights without having to defer to NLRB jurisdiction.

This Court's trend has been towards recognition and non-preemption of state law claims which "arguably" fall within the ambit of the National Labor Relations Act. *See Gray v. Local 714, Int'l Union of Operating Engineers*, 778 F.2d 1087, 1090 (5th Cir. 1985). This Court's recent decisions have unsettled the previous outer limits of the pre-emption doctrine. *Id.* at 1090.

The constitutional principles of pre-emption, in whatever particular field they operate, are designed with a common end in view; to avoid conflicting regulation of conduct of various official bodies which might have some authority over the subject matter. *Amalgamated Association of Street, Electric R.R. & Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 295 91 S.Ct. 1909, 1917 (1971).

In *Garmon*, this Court declared: When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitutes an unfair

labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield. *Supra*, 359 U.S. at 244 and 79 S.Ct. at 779. However, this Court in *Garmon* recognized permissible state law claims to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. The apparent point of Garmon concern is the possibility that both the Board and state courts may have a conflict of remedies. *See Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. Russell*, 356 U.S. 634, 644, 78 S.Ct. 932, 938 (1958). However, the thrust of this Court's concern has been that one forum would enjoin, as illegal, conduct which the other forum would find legal, or that the state courts would restrict the exercise of rights guaranteed by the Federal Act. *Id.* at 356 U.S. 634, 78 S.Ct. at 938. In *Russell*, this Court concluded there is no conflict even if one forum awarded back pay and the other did not. *Id.* at 939. Just as in *Russell*, the state law causes of action, applicable to this case, do nothing to alter rights and duties affirmatively established by Congress in the National Labor Relations Act.

The pre-emption doctrine, has never been rigidly applied to cases where it could not fairly be inferred that Congress intended *exclusive* jurisdiction to lie with the NLRB. *Vaca v. Sipes*, 386 U.S. 171, 180, 87 S.Ct. 903, 911 (1967). (emphasis added). In fact, the Court noted a number of congressional exceptions to pre-emption.[1]

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[1] Section 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, 29 U.S.C. Section 187, expressly permits

(Continued on following page)

In addition to the congressional exceptions, this Court has refused to hold state-law remedies pre-empted "where the activity regulated was merely a peripheral concern of the Labor Management Relations Act . . . or touched interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, this Court could not infer that congress deprived the state of the power to act. *Id.* at 386 U.S. 171, 87 S.Ct. at 911 and *See Farmer v. United Brotherhood of Carpenters and Joiners of America, Inc.*, 430 U.S. 290, 97 S.Ct. 1056.

The National Labor Relations Act does not pre-empt a state law cause of action for intentional infliction of emotional distress. *Farmer v. United Brotherhood of Carpenters and Joiners of America, Inc.*, 430 U.S. 290, 97 S.Ct. 1056. This Court has also refused to apply the pre-emption doctrine where the particular rule of law sought to be invoked before another tribunal is so structured and administered that in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes. *Id.* at

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anyone injured by a violation of NLRA Section 8(b)(4) to recover damages in a federal court even though such unfair labor practices are also remediable by the Board; Section 301 of that Act, 61 Stat. 156, 29 U.S.C. Section 185, permits suits for breach of a collective bargaining agreement regardless of whether the particular breach is also an unfair labor practice within the jurisdiction of the Board (see *Smith v. Evening News Assn.*, 371 U.S. 195, 83 S. Ct. 267, 9 L.Ed.2d 246 (1962)); and NLRA Section 14, as amended by Title VII Section 701(a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, 29 U.S.C. Section 164(c).

1062. This Court has consistently recognized the historic state interest in such traditionally local matters as public safety and order and its use of streets and highways. *Id.* at 1063.

The court in *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987) in holding that pre-emption did not apply in a wrongful termination case where an employee had complained about safety violations, stated that the state's OSHA laws were intended to benefit and protect all employees as individuals irrespective of any labor agreements. The court noted that the "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the state." *Paige v. Henry J. Kaiser Co.*, 826 F.2d at 864, *quoting Metropolitan Life v. Mass.*, 471 U.S. 724, 85 L.Ed.2d 728, 105 S.Ct. 2380 (1985). "Child labor laws, minimum and other wage laws, *laws affecting occupational health and safety* . . . are only a few examples." *Id.* (emphasis in original).

Texas too has a compelling state interest in protecting the health and safety of their workers. If a state has a substantial interest in protecting its citizens from intentional infliction of emotional distress, it likewise has a more compelling interest in protecting its citizens from being retaliated against for refusing to commit an illegal act or for making good faith attempts to determine if a requested act is illegal. State employment tort law, when viewed in the light of the discrete concerns of the federal scheme reveals that the potential for interference is insufficient to counterbalance the legitimate and substantial interest of the state in protecting its citizens. *Farmer supra* at 97 S.Ct. 1056.

Texas has exhibited deeply rooted local feeling and responsibility with respect to its history of employment at will. In *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985), the court declared: We now hold that public policy as expressed in the laws of this state and the United States which carry criminal penalties, requires a very narrow exception to the employment-at-will doctrine announced in *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 75, 10 S.W. 99, 102 (1888). The court noted the courts of Texas have steadfastly refused to vary from that holding. *Id.* at 734. The Texas Supreme Court carved out a very narrow exception which covered only the discharge of an employee for the sole reason that the employee refused to perform an illegal act. This clearly evinces Texas' deeply rooted interest in local feeling and responsibility.

Following the *Sabine Pilot* reasoning, the Texas public policy exception expanded slightly to provide protection to an employee who was discharged in retaliation for a good faith attempt to determine if an employer's action is illegal. *Johnston v. Del Mar Distributing Co.*, 776 S.W.2d 768, 771 (Tex. App. – Corpus Christi 1989, writ denied). The court of appeals concluded that "public policy" demands that an employee be allowed to investigate into whether actions are legal so as to determine what course of action to take. *Id.* at 771.

More recently, the Texas Supreme Court has stated an employer who uses hazardous chemicals may not discharge an employee who reports a violation of the Hazard Communication Act. *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 724 (Tex. 1990). The Court in its opinion delineates the very limited exceptions to

employment at will which exist in Texas. *Id.* at 724. Clearly, the exceptions are interests deeply rooted in local feeling and responsibility so as to avoid *Garmon* pre-emption and are of peripheral concern to the federal law.

Recently, the Fifth Circuit refused to pre-empt a Texas statutory exception to employment at will. *Jones v. Rodeway Express, Inc.*, 931 F.2d 1086, 1089 (5th Cir., 1991). The court reasoned that the collective bargaining agreement did not establish pre-emption *even when* the Plaintiff's state law claims are *intertwined with the collective bargaining agreement*. *Id.* at 1089. (emphasis added.) Deviation from such a holding will inundate the federal court system with removal and pre-emption claims in the face of every state employment tort. In Keener's case, there is no union, no collective bargaining agreement, no bargaining unit, no mention of group activity, no group remedy, no group action. Of equal importance is Texas' deep rooted interest in protecting its citizens from unlawful employment practices. The state causes of action do not affect NLRA application and are of only a peripheral concern to the Act. Clearly, pre-emption should not apply here.

CONCLUSION

Although the National Labor Relations Act was enacted to insure uniform application of labor law, it is doubtful that its application and intent should be so broad yet enigmatic. Keener's actions were neither arguably concerted activity nor should his cause of action be the subject of *Garmon* pre-emption. More importantly, the

State of Texas has evidenced a deeply rooted interest in carving out exceptions to the employment-at-will doctrine. The granting of summary judgment in this case was improper.

WHEREFORE, PETITIONER, Bernard Keener, respectfully prays that this Honorable Court grant Petitioner's writ of certiorari, reverse the judgments of the Court of Appeals for the Fifth Circuit and the trial court with instructions to remand the case for trial on the merits.

Respectfully submitted,

JOHN E. WALL, JR.
3109 Carlisle, Suite 103
Dallas, Texas 75204
(214) 871-8808
(214) 969-7629 (facsimile).

APPENDIX

APPENDIX A

CAUSE NO. 90-02816

BERNARD R. KEENER	)	IN THE
V.	)	DISTRICT COURT
	)	
HOECHST CELANESE CORPORATION a/k/a CELANESE PLASTICS COMPANY, a/k/a CELANESE PLASTICS COMPANY, A DIVISION OF CELANESE CORPORATION, f/k/a CELANESE CORPORATION OF AMERICA, f/k/a CELANESE CORPORATION and HOECHST CELANESE CHEMICAL GROUP, INC. a/k/a CHEMICAL GROUP, f/k/a CELANESE CHEMICAL COMPANY, INC. a/k/a HOECHST CELANESE CHEMICAL COMPANY	)	DALLAS COUNTY, TEXAS
	)	44th JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

(Filed Mar. 9, 1990)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Bernard R. Keener, Plaintiff, complaining of Hoechst Celanese Chemical Group, Inc. and Hoechst Celanese Corporation and for cause would show the Court as follows:

I.

Plaintiff, Bernard R. Keener, is a resident of Pampa, Gray County, Texas.

II.

Defendant, Hoechst Celanese Chemical Group, Inc. a/k/a Chemical Group, f/k/a Celanese Chemical Company, Inc. a/k/a Hoechst Celanese Chemical Company is a Texas profit corporation and may be served with process by serving their registered agent: C.T. Corporation System, 911 Dallas Avenue, Houston, Harris County, Texas.

Defendant, Hoechst Celanese Corporation a/k/a Celanese Plastics Company, a/k/a Celanese Plastics Company, A Division of Celanese Corporation, f/k/a Celanese Corporation of America, f/k/a Celanese Corporation is a Delaware Corporation authorized to do business in the State of Texas, has an agency or representative in Dallas County, Texas and may be served with process by serving their registered agent: C.T. Corporation System, 911 Dallas Avenue, Houston, Harris County, Texas. Venue is proper in Dallas County, Texas, pursuant to Tex. Civ. P. and Remedies Code #15.037 and #15.061.

III.

On or about June 14, 1988, the Plaintiff was discharged from his employment at the Defendant's Pampa LPO Butane Reactor Plant. The pretext for discharge was insubordination.

IV.

Plaintiff had been employed by Hoechst Celanese Chemical Group as a chemical and boiler operator from October 1967, until he was discharged.

V.

Plaintiff began his employment as a helper in the Operations department. He next worked for two (2) years in Area II, running samples, gaging, mixing catalyst, chromic acid and cobalt nitrate, general [sic] assisting the operators and supervisors. The Plaintiff was then promoted to operator, in Area II, a position he held for the following four (4) years. Plaintiff then began to gain a more extensive knowledge of the workings of the plant by performing various duties in Areas I, IA, III and IV.

VI.

In the late 1970's, the Pampa plant undertook a major construction project known as the Pampa Fuel Conversion Project. This involved replacing the plant's eight gas fired boilers with two coal fired boilers. Plaintiff began to work with the coal fired boiler system during this time, and then remained for the following five years.

VII.

On November 14, 1987, a series of devastating fires and explosions severely damaged the plant and surrounding community. After the destruction of the Defendant's plant and prior to the start of the rebuilding

process, the Plaintiff worked as a guard. As the reconstruction of the plant began, Plaintiff was again assigned to work in the area of the coal fired boilers.

VIII.

On June 13, 1988, Plaintiff and his co-workers were ordered to remove the fly ash bags from their mountings in the bag house.

IX.

Fly ash bags are used to catch the ash created from the burning of coal in the boilers and are housed in a facility known as the "bag house". The bags are 8 to 9 inches in diameter and 30 feet in length. They are suspended from a spring at the top and hooked around a thimble on the bottom and each contain 75 to 110 pounds of ash. The bags act as a filter, similar to a vacuum cleaner bag. Without these bags, the fly ash, which contains dangerous and hazardous chemicals (including carcinogenic and mutagenic materials), would simply flow from the boilers into the air, polluting the atmosphere.

X.

These bags are an integral part of the plant's ash gathering system, a system which is required for the safe collection and disposal of this hazardous material. Without this system, the ash would be released into the environment in violation of Federal and State laws and in violation of permits granted to the plant.

XI.

Plaintiff and his co-workers were moving about 8,000 of the bags, full of ash. They were told to cut the ash loose from the bags in order to replace the bags with new ones. The normal and safe procedure involved using the ash collection system to contain the ash as it was removed from the bags and collect it in a silo or vacuum truck for safe and lawful disposal.

XII.

Plaintiff requested that his supervisor, Don Elledge, start up the regular ash removal system. Mr. Elledge refused, as the silo had just been cleaned and he did not want to get it dirty. Plaintiff suggested that a vacuum truck or some other containment method be utilized to prevent the toxic material from being released. Plaintiff knew that such a release would be a violation of various clean air laws, including the Occupational Safety Health Act. Mr. Elledge refused, and ordered Plaintiff to continue to simply empty the bags outside the bag house, scattering the ash into the surrounding ground and air.

XIII.

On June 13, 1988, at about 9:00 p.m. Plaintiff called personnel manager of the company, Jane McBunch, regarding this incident. Plaintiff was attempting to report the dumping of fly ash into the atmosphere. Plaintiff told her that such actions were in violation of the Occupational Safety Health Act and other laws. Plaintiff explained to Ms. McBunch that there were other, more

desirable and safer methods to dispose of the ash, and that the method he was ordered to use would violate laws, was an infraction of OSHA regulations and endangered the health and safety of himself, his co-workers, and the environment in general. Instead of taking actions to prevent the further endangerment and harm to Plaintiff, his co-workers, and the environment, Plaintiff was informed that he should continue to simply dump the ash onto the ground, ignore the danger and disregard the violations of the law. The only alternative given to him was to quit his job.

XIV.

The following day Plaintiff was terminated for insubordination.

XV.

As a direct and proximate result of said improper and unjustified discharge, Plaintiff has lost earnings which would have been earned had he not been unfairly discharged. Although Plaintiff has tried diligently and honestly to secure other gainful employment, he has been unable to do so and has accordingly been unemployed since his wrongful termination.

XVI.

As a direct and proximate result of Defendant's conduct, Plaintiff has suffered damages in excess of the minimum jurisdictional limits of this Court. Those damages

include past and future physical pain and mental anguish, past and future lost wages and benefits.

XVII.

Plaintiff would further show that all of the above set for [sic] acts on the part of the Defendants, raises a presumption of conscious indifference to consequences of their actions, to-wit: wrongfully discharging the Plaintiff in violation of public policy with the intent to do harm. The Defendant was engaging in illegal activities, and the Plaintiff warned Defendants of such activity. By warning said Defendants of such illegal activity, the Plaintiff was discharged. "These acts were willful and wanton on the part of the Defendant who was aware or should have been aware that the Defendant was in fact violating federal law. Plaintiff, as a result of the willful, wanton, and malicious treatment by the Defendant, seeks to recover punitive damages in the amount of $1,000,000.00.

WHEREFORE, premises considered, Plaintiff prays that the Defendant be cited to appear and answer herein as the law directs, that upon final hearing hereof, Plaintiff have and recover of and from Defendant, the following:

1. Reinstatement with no reprisal;
2. Back pay with interest from the time of the wrongful discharge;
3. Actual damages in an amount in excess of the minimum jurisdictional limits of this Court.
4. Punitive damages in the amount of $1,000,000.00 together with interest from June 14, 1988, until the date of trial; together

with Plaintiff's costs herein, and attorneys fees in a reasonable amount, and interest on said judgment from the date thereof until paid at the legal rate, and for such other and further relief, special and general, at law and in equity, to which Plaintiff may be entitled to receive.

Respectfully submitted,

/s/ John E. Wall Jr.
John E. Wall, Jr.
3109 Carlisle, Ste. 103
Dallas, Texas 75204
214/871-8808
State Bar No. 20756750

APPENDIX B

NO. 90-02816-B

BERNARD R. KEENER	§	IN THE
V.	§	DISTRICT COURT
	§	
HOECHST CELANESE	§	44TH JUDICIAL
CORPORATION a/k/a	§	DISTRICT
CELANESE PLASTICS	§	DALLAS COUNTY,
COMPANY, a/k/a	§	TEXAS
CELANESE PLASTICS	§	
COMPANY, a Division of	§	
CELANESE	§	
CORPORATION, f/k/a	§	
CELANESE	§	
CORPORATION OF	§	
AMERICA, f/k/a	§	
CELANESE	§	
CORPORATION and	§	
HOECHST CELANESE	§	
CHEMICAL GROUP, INC.	§	
a/k/a CHEMICAL	§	
GROUP, f/k/a CELANESE	§	
CHEMICAL COMPANY,	§	
INC. a/k/a HOECHST	§	
CELANESE CHEMICAL	§	
COMPANY	§	

DEFENDANTS' ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Come now Defendants Hoechst Celanese Corporation and Hoechst Celanese Chemical Group, Inc., and for their answer would respectfully show unto the court the following:

I.

Plaintiff's action is barred by laches and the applicable statute of limitations.

II.

Plaintiff has failed to exhaust the administrative remedies available to him.

III.

Plaintiff's action is preempted by 29 U.S.C. § 151, *et seq.*

IV.

Plaintiff's action is preempted by 29 U.S.C. § 660(c).

V.

Plaintiff has failed to mitigate his losses, if any.

VI.

Defendants deny each and every, all and singular, the allegations in Plaintiff's original petition, and demand strict proof thereof.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that judgment be entered for Defendants and that Plaintiff take nothing by this action. Defendants pray

for the recovery of their costs herein, including reasonable attorney's fees, and for such other and further relief to which they may show themselves to be justly entitled.

Respectfully submitted,

MATTHEWS & BRANSCOMB
A Professional Corporation
106 South St. Mary's Street
One Alamo Center, Suite 800
San Antonio, Texas 78205
(512) 226-4211

/s/ J. Joe Harris
J. Joe Harris
State Bar No. 09062000

M. Colleen McHugh
State Bar No. 13674600
MATTHEWS & BRANSCOMB
A Professional Corporation
1800 First City Bank Tower
Corpus Christi, Texas 78477
(512) 888-9261

ATTORNEYS FOR
DEFENDANTS,
HOECHST CELANESE
CORPORATION
and
HOECHST CELANESE
CHEMICAL
GROUP, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants' Original Answer has been forwarded by certified mail, return receipt requested, on this the 16th day of May, 1990, to Mr. John E. Wall, Jr., attorney for Plaintiff, 3109 Carlisle, Suite 103, Dallas, Texas 75204.

/s/ J. Joe Harris
J. Joe Harris

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BERNARD R. KEENER, Plaintiff,	§	
vs.	§	CA 3-90-1212-R
HOECHST CELANESE CORPORATION a/k/a CELANESE PLASTICS COMPANY, a/k/a CELANESE PLASTICS COMPANY, a Division of CELANESE CORPORATION, f/k/a CELANESE CORPORATION, f/k/a CELANESE CORPORATION OF AMERICA, f/k/a CELANESE CORPORATION and HOECHST CELANESE CHEMICAL GROUP, INC., a/k/a CHEMICAL GROUP, f/k/a CELANESE CHEMICAL COMPANY, INC. a/k/a HOECHST CELANESE CHEMICAL COMPANY, Defendant.	§	

MEMORANDUM OPINION AND ORDER

(Filed June 30, 1991)

Defendants move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure against Plaintiff Bernard R. Keener ("Keener"). For the following

reasons, this Court is of the opinion that Defendants' Motion for Summary Judgment should be GRANTED.

BACKGROUND

This is a wrongful discharge case. Plaintiff alleges he was discharged from employment because he reported to senior management activities he believed to be a violation of the Occupation Safety and Health Act ("OSHA") and other federal and state laws. The activity Keener complained of involved the removal and disposal of fly ash bags used in conjunction with coal fired boilers. Plaintiff was terminated for insubordination on June 14, 1988.

Plaintiff originally filed this action in the District Court, 44th Judicial District, Dallas County, Texas on March 7, 1990. The case was removed to this Court on May 22, 1990. Defendants move for summary judgment, arguing (1) that Plaintiff lacks standing to sue under OSHA, (2) that Plaintiff has failed to exhaust administrative remedies, (3) that Plaintiff's state law claims are preempted by federal law, and that regardless, (4) Plaintiff was employed at-will and (5) failed to exhaust administrative remedies under state law.

ANALYSIS

Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment only where there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law.[1] All

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[1] Fed. R. Civ. P. 56(c).

reasonable doubts and inferences must be decided in the light most favorable to the party opposing the motion.[2] Indeed, as long as there appears to be some evidentiary support for the disputed allegations, the motion must be denied.[3]

OSHA

It is undisputed that Plaintiff's allegations, if true, would constitute a violation of section 11(c) of OSHA.[4] As the Act provides for original jurisdiction in United States District Courts,[5] this court has subject matter jurisdiction pursuant to 28 U.S.C. § 1441. Nevertheless, under OSHA, only the Secretary of Labor is authorized to maintain an action.[6] Accordingly, Plaintiff has no private cause of

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[2] *Thornbrough v. Columbus and Greenville R.R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985).

[3] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Coke v. General Adjustments Bureau*, 640 F.2d 584, 595 (5th Cir. 1981 (en banc).

[4] 29 U.S.C. § 660(c). Section 11(c)(1) reads in relevant part:

> No person shall discharge or in any manner discriminate against any employee . . . because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

29 U.S.C. § 660(c)(1) (1985 & Supp. 1991). *See also* 29 C.F.R. § 1977.9(c) (1990).

[5] 29 U.S.C. § 660(c)(2) (1985 & Supp. 1991).

[6] 29 U.S.C. § 660(c)(2) (1985 & Supp. 1991).

action under section 11(c)(1) of OSHA[7] and his claims under that Act must fail as a matter of law.

PREEMPTION

Defendant contends that the conduct Plaintiff complains of is arguably violative of the National Labor Relations Act, 29 U.S.C. § 151, et seq. (the "NLRA") and therefore, any state cause of action is preempted by the Act.[8] Section 7 of the NLRA protects an employee's right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" as well as employee participation in union activities.[9] Section 8 prohibits unfair labor practices.[10]

In *San Diego Unions v. Garmon,*[11] the Supreme Court determined that when an activity arguably falls within

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[7] *George v. Aztec Rental Center, Inc.*, 763 F.2d 184, 187 (5th Cir. 1985) (finding grant of summary judgment for defendant appropriate because "plaintiff had no private cause of action under federal law for his employer's retaliatory discharge in violation of section 11(c)(1)"). *Accord Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980) (finding that section 11(c)(1) does not provide a private cause of action for aggrieved employees).

[8] Although the conduct may be violative of the Toxic Substances Control Act, 15 U.S.C. § 2622, and the Clean Air Act, 42 U.S.C. § 7622, these statutes create only administrative remedies that Plaintiff has apparently not invoked or exhausted.

[9] 29 U.S.C. § 157 (1973 & Supp. 1991).

[10] 29 U.S.C. § 158 (1973 & Supp. 1991).

[11] 359 U.S. 236 (1959).

section 7 & 8, courts should defer to the NLRB for determination of the activity's status.[12] In the instant case, Defendants demonstrate that Keener's activity "arguably" falls within section 7 & 8 of the NLRB. Summary judgment evidence established that in reporting to the management, Keener was responding not only to his own concerns, but to those expressed by his coworkers.[13] In addition, although he denies that his conversations and actions constituted "concerted activity" within the meaning of sections 7 & 8 of the NLRA, Keener admits that he assumed that he acted as a spokesman for the group.[14] As Defendants contend, Keener's conduct is arguably protected under the NLRA.[15] Consequently, as the determination of the status of the activity properly lies with

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[12] *Id.* at 245.

[13] Kenner [sic] Deposition at 18-22.

[14] *Id.*

[15] Defendants also argue that regardless of whether Keener's claims are preempted, he was an employee at-will and could be terminated without cause. Plaintiff argues that he has a cause of action under Tex. Rev. Civ. Stat. Ann. art. 5182(b), § 15(b). Although that section was repealed, a comparable provision appears in section 502.013 of the Texas Health and Safety Code (the "Hazard Communication Act"). Among other things, section 502.013(c) prohibits an employer from discharging, disciplining or in any manner discriminating against an employee who has filed a complaint under the Act or exercised any rights afforded employees under the Act.

The Court notes, without comment, that in *Winters v. Houston Chronicle Publishing Co.*, the Texas Supreme Court explicitly recognized state legislative exceptions to the employment at-will doctrine, including the Hazard Communication Act. The Court stated:

(Continued on following page)

the NLRB, and as it is undisputed that Keener never filed a claim with the NLRB, Keener's remaining state law claims must fail as a matter of law.[16]

(Continued from previous page)

> The legislature has also placed restrictions upon the at will employment doctrine. In protecting employees who report illegal activities in the workplace, the legislature has enacted protection for a limited class of employees. . . . An employer who uses hazardous chemicals may not discharge an employee who reports a violation of the Hazard Communication Act., Tex. Health & Safety Code Ann. § 502.13 (Vernon 1990).

Defendants do not dispute the relevance of the Hazard Communication Act, however, they argue that the court is without jurisdiction to hear Keener's claim under the Act as primary jurisdiction vests with the administrative agency charged with the Act's administration, or alternatively, because Keener has failed to exhaust administrative remedies under the Act. Defendants also argue that as a preliminary matter, all of Plaintiff's state claims are preempted by the NLRA.

As this Court finds that Plaintiff's claims were more appropriately within the jurisdiction of the NLRB, this Court will not make a determination as to Keener's state statutory claim other than to recognize that the Hazard Communication Act acts as an exception to the employment at will doctrine under Texas law.

[16] The Supreme Court stated:

> When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state

(Continued on following page)

It is therefore

ORDERED that Defendants' Motion for Summary Judgment is GRANTED.

SIGNED THIS 30 DAY OF JUNE, 1991.

/s/ Jerry Buchmeyer
UNITED STATES
DISTRICT JUDGE
JERRY BUCHMEYER

(Continued from previous page)

> jurisdiction must yield. To leave states free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. . . .

San Diego Unions, supra, 359 U.S. at 244. The Court further noted:

> What is outside the scope of this Court's authority cannot remain within a state's power and state jurisdiction too must yield to the exclusive primary competence of the Board.

Id. at 245. The reporting violations of statutes such as OSHA, or more generally, complaints that involve working conditions, do fall within the Act. *See Ewing v. NLRB,* 861 F.2d 353 (2d Cir. 1988).

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1792

BERNARD R. KEENER,

Plaintiff-Appellant,

v.

HOECHST CELANESE CORPORATION a/k/a CELANESE PLASTICS COMPANY, a/k/a CELANESE PLASTICS COMPANY, A Division of CELANESE CORPORATION, f/k/a CELANESE CORPORATION OF AMERICA and HOECHST CELANESE CHEMICAL GROUP, INC., a/k/a CHEMICAL GROUP, f/k/a CELANESE CHEMICAL COMPANY, INC. a/k/a HOECHST CELANESE CHEMICAL COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(CA-3-90-1212-R)

(March 11, 1992)

Before KING, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:*

Bernard R. Keener, plaintiff-appellant, claims that he was discharged from his employment in retaliation for expressing concerns about working conditions. In his deposition, Keener testified that his concerns were shared by and discussed with several co-workers who looked to him to "bring it up" with management. When Keener approached his supervisor with his observations, he advised the supervisor that his co-workers were also concerned and asked if the manner in which they were performing their work could be modified. Ultimately, Keener reported the incidents of unsafe working conditions to his employer's personnel manager. Shortly thereafter, Keener was summarily discharged.

Keener filed suit in the district court alleging wrongful discharge in violation of federal and state laws. The district court concluded that Keener was arguably engaged in concerted activity protected by the National Labor Relations Act (the "Act") and that the question of whether Keener had in fact been discharged for engaging in such conduct lay within the exclusive jurisdiction of

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

the National Labor Relations Board (the "Board"). Keener appeals.

We agree with the district court. Keener, by his own testimony, voiced concerns on behalf of himself and several other employees. Under these circumstances, his conduct was arguably protected by §§ 7 and 8 of the Act, 29 U.S.C. §§ 157, 158. Conduct which is arguably protected by §§ 7 and 8 of the Act lies within the exclusive jurisdiction of the Board. Under the very broad definition that the Supreme Court has given the term "concerted activities," it is clear that Keener's activities in this case qualify. The protection of concerted activity is one of the principal concerns of the Act. Any state law claim premised upon concerted activity must give way.

AFFIRMED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BERNARD R. KEENER Plaintiff, VS. HOECHST CELANESE CORPORATION A/K/A CELANESE PLASTICS COMPANY, A/K/A CELANESE PLASTICS COMPANY, A DIVISION OF CELANESE CORPORATION, F/K/A CELANESE CORPORATION OF AMERICA, F/K/A CELANESE CORPORATION AND HOECHST CELANESE GROUP, INC., A/K/A CHEMICAL GROUP, F/K/A CELANESE CHEMICAL COMPANY, INC. A/K/A HOECHST CELANESE COMPANY Defendants.	)	CIVIL ACTION NO. CA3-90-1212-R

ORAL DEPOSITION OF BERNARD R. KEENER

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* * *

[p. 15] Q. Did you continue to drive for Waters Livestock Company after you left the employment of Celanese?

A. No.

Q. Why?

A. I'm pretty sure he's out of business. I sort of lost touch with him.

Q. Mr. Keener, when did you go to work for Hoechst Celanese?

A. October 30, 1967.

Q. And you worked for Hoechst Celanese until what date?

A. June 14, 1988.

Q. In your own words, would you please tell me about the circumstances leading to your termination of employment at Hoechst Celanese?

A. The day that –

Q. Actually I believe – and you correct me if I'm wrong, but I believe the events actually occurred the day before you were terminated.

A. Yes.

Q. If you would, please, just take me step by step through the events that led to your discharge.

A. Oh. I had been assigned to Area 1-B, and I had been there a week, maybe 10 days. We'd been doing odds job [sic] around the unit, myself and several other operators. What had we been doing? We'd been repacking valves. We had [p. 16] added some stuffing boxes to some large valves on the top of the bag house. We had cleaned out the fly ash silo, changed out the porous rock there in the bottom of that to – that kept the ash from intermingling with the air purge system in the silo. And then on the day before I was terminated, we started work in the bag house themselves.

Q. What specifically were you doing in the bag house the day before your termination?

A. We were removing the bags. I assume we were going to remove all of them, approximately 8,000 bags. The bags are eight to nine inches in diameter, roughly 20 – maybe 30 feet long, tall. And the number escapes me now, how many there are in each compartment. I vaguely remember there being 13 compartments per bag house. They're affixed to a thimble that sticks out of the floor approximately four inches at the bottom. They're affixed at the top by another thimble aparatus [sic] and a spring-loaded hook.

They're very close together with, oh, a half inch separating each bag, with rows inside the compartment that you could walk down, and, if necessary, during the downtime you could get to a bag that was torn or had a hole in it or had just stopped operating properly.

It was quite a number of bags in each compartment. Several hundred, let's say. We were cutting them off from the thimble at the bottom, going upstairs, lifting them off [p. 17] the hook, and dropping them down to the floor, which was making quite a dusty area inside the bag house. We then threw them out of a manhole, which is 30 inches wide by three, four feet high, out past a walkway and a rail roughly four feet away, over the rail onto the ground below, another 20 feet down to the ground.

There was a dumpster near, but we weren't able to throw them far enough to the dumpster, so therefore they were hitting the ground and the ash that was inside them was just going every place. The bags were quite heavy. The explosion had occurred, and the boiler was shut down, with nothing – The automatic procedure just didn't have time to get around to the compartments and empty the ash out like it should have. So it had been sitting there for six months.

Some of them were quite heavy. I remember standing on the platform trying to lift the bags up in a position that you have good force from, and some of them I could just barely get them off the hooks. So 100 pounds possibly of ash, maybe more, in each bag. You know, some of them not quite as heavy. So we had quite a lot of ash.

We got a late start, started before first break. Six hours of work, we'd finished maybe one compartment,

and had ash covering a lot of country, maybe a 100 by 200 – and possibly even 200 feet square of concrete several inches [p. 18] deep, plus the bags lying in a pile. And I'd asked my immediate supervisor, who at the time who [sic] was Don Elledge, if we should be doing it that way.

(Ms. Owen entered the depostion [sic] at this time.)

I think his answer at the time was just this is just the only way to do it. Well, I had worked in the unit several years prior, and I knew that wasn't right, because they had replaced bags during turnaround, and they had gotten large vacuum trucks in. They were – The name of them was Super Sucker. And they had taken all the ash out of the bags, or whatever was necessary. They didn't get ash outside the bag house.

As a matter of fact, the bag houses had been cleaned. When we started that day they obviously, before I got there, had cleaned the bag houses themselves out, because they were just in, I remember thinking, almost immaculate condition, so they had been cleaned before I got there, by some vacuum system.

Around – Let's say before lunch that day, Mr. Ellis came by, and I mentioned some of my co-workers – they were relatively new, and they were concerned, and they had asked me, "Should we be doing this and should we be doing it this way?" One gal I particularly remember whose name was [p. 19] Kelly Freeman. I think she has since remarried, and the name wouldn't be the same. I don't know what it is. She seemed to be concerned about it.

And I asked Mr. Elledge if he couldn't start up the vacuum system, the vacuum pump, which was the normal system for removing ash out of the bottom, bottom of the hopper – of the bag house. At that he says, "No, you dummy, we can't do it that way. We just cleaned out the fly ash silo last week," which we had. We'd obviously gotten the cart before the horse.

Well, we went to lunch. Keep in mind the plant was blown up. It was pretty well demolished. The control room in 1-B was gone. We had no water, no way to clean up for lunch, so we just kind of ate the best we could. After lunch we worked about an hour or so, and Mr. Elledge came by again, and I asked him then, "Are we supposed to be doing this this way?" I mean, we are required by law and by permit for these boilers to collect this ash inside this bag house and transport it – At the time they were transporting it to section 133, which was our water well property section, and burying it.

I think there was another part to the question that I've lost it. But he just looked at me for a couple of seconds and turned around and walked off. Didn't even acknowledge that I had spoken to him.

[p. 20] Q. Mr. Keener, I'm going to interrupt you for a few minutes and let's try to clarify some of these things that you've told us. You said that others on the crew that you were working with that day had also expressed their concern?

A. Yes.

Q. You mentioned specifically a Kelly Freeman. What did she say to you?

A. She asked if we were supposed to be in this fly ash and exposing ourselves. "Is there anything in there that will hurt me," I think is a quote. And I had to tell her, "Yes, there is." They burn – Let's say all of the plant residues, liquid residues, were burned inside the boilers, which consisted of a lot of heavy metals, chromium, cobalt.

It had been two or three years since I had worked in the unit. I don't know if when I worked there if I knew which way the separation went. I was assuming that it – some probably went down and some probably went up. As it turned out, I think I was right. I think it's a pretty even cut, maybe fifty-fifty, goes to the bottom ash and 50 percent goes fly ash, roughly.

It's – You know, heavy metals are not good for you. We are learning more about them every day. I understand recently the State of California has outlawed chromium in the state. You're not allowed to bring chromium into the [p. 21] stay [sic] anymore.

Q. So there was some concern among the crew about their own personal safety in working with the fly ash?

A. I think so, yes. There was in mine.

Q. Well, apparently, Ms. Freeman also had this same concern. She was asking you –

A. I would say, yes.

Q. Who were some of the other people who were on the crew that day?

A. Lonny Richie. I'm having a problem with the names. I don't do people's names well.

Q. Okay. Well, let's come back to those names in a few minutes.

A. Larry Atchison.

Q. Anybody else?

A. Yes. There were several more, and I'm just –

Q. Take your time.

A. Kingery Nickerson.

MR. WALL: Do you know how to spell his first name, or hers?

THE WITNESS: I'll take a stab at it. K-i-n-g-e-r-y. And it definitely is not a her.

BY MR. HARRIS:

Q. Okay.

A. He's a very large black guy, real nice guy.

[p. 22] Q. And his last name is Nickerson?

A. Nickerson. I don't remember any more. Oh, you've got Kelly. One, two, three, four. That may be all.

Q. During the course of the day, either while you were working or at break time or during lunchtime, did you have any discussions with any of these other individuals about these working conditions that you were in that day?

A. Lunch was rather quiet. Everybody was nasty and filthy, and we didn't even wash our hands. We

weren't talking at lunch. There wasn't anything said at lunch. It would have been – I don't remember any of the others. I remember Mr. Nickerson at one time saying that it was up to me to take care of them because they didn't know what they were doing, and I had been there long enough that I was supposed to know. I remember kind of jokingly saying, "That's an awful big order."

Q. So he was suggesting to you that you kind of act as spokesman for the group?

A. I felt that's what Kelly Freeman was saying, too, that both of them, and, since I'd been there longer than they had, that possibly I should bring it up. That was the assumption that I made.

Q. But that assumption was based upon what they were saying to you?

A. Plus my own feelings. I – Yeah, sure.

[p. 23] Q. But at least Ms. Freeman and Mr. Nickerson were kind of looking to you, because you had been there longer, to serve as spokesman for the group?

A. Yes, I felt that.

Q. Do you recall the name Ronnie Terry?

A. Yes.

Q. Was he also on the crew that day?

A. Yes.

Q. Were you wearing any type of protective clothing or equipment that day?

A. We had scrounged up a pair of coveralls. We had asked for gas masks with R21 – I specifically had asked

for a gas mask with an R21 carbon filter on it. Sometime Mr. Nickerson went after the gas masks, and when he brought them back, he said all they would give him were the gas masks body with the felt filter attached, that that was a dust filter and that's all we needed and that's all they'd used in the past.

And everyone – or I particularly – I can't say "everyone." I was concerned that wasn't going to be enough breathing protection. I wanted a full face mask to protect my eyes, and they gave us the little nose-mouth type filters. And that was all we could get. I'm sure gloves. I don't remember gloves, but – We didn't have rubber boots. That's about it. Hard hat and safety glasses.

[p. 24] Q. Did all of you wear the masks while you were working in the bag house?

A. Oh, yes.

Q. The bag house where these bags hung, this is where the fly ash was collected?

A. Yes.

Q. And the bags were attached to a vacuum system, were they not?

A. The vacuum system was part of removing the ash that had collected in the bag house, yes.

Q. And if we could draw an analogy, these bags were like the bag in a vacuum cleaner?

A. More or less, yes.

Q. When you asked Mr. Elledge if these bags could not be emptied and this residue vacuumed into the silo,

he told you what? That the silo had already been cleaned up?

A. Yes.

Q. Isn't it also true at that time, though, that the vacuum system was down, was not working?

A. There was no reason for it to be running unless we were going to use it to clean out the bag house.

Q. Do you know what the source of power was to that vacuum?

A. It was electrical.

Q. Do you know whether or not it was in operation at

* * *

[p. 28] remember.

Q. And on this particular day, June 13, 1988, when you were working in the bag house, was that the first day that you had been doing that particular task?

A. Yes.

Q. You have described your attempts to talk to Mr. Elledge, Don Elledge. Was he the supervisor on that crew?

A. I would say yes.

Q. Did you attempt to talk to anybody else in supervision during the course of the day?

A. No. Mr. Elledge was answering to McElliott, but I didn't know where Mr. McElliott was located. I probably – He and I didn't get along very well, so I probably wouldn't have spoken with him anyway.

Q. Later that day after you had left work, did you telephone Ms. McBunch?

A. Yes.

Q. And who is Ms. McBunch?

A. My words, personnel manager. They had a really nice title. It escapes me what it is.

Q. But in your eyes she was the personnel manager?

A. Yes.

Q. And is her name Jane, Jane McBunch?

A. Jane McBunch.

Q. What time of day was it when you telephoned Ms. [p. 29] McBunch?

A. 9:40 p.m.

Q. And why are you so certain of the time?

A. It's in the tape that I got from the Texas Employment Commission.

Q. Why did you call Ms. McBunch?

A. I had thought continuously since leaving work, driving home with ash all over me – I didn't even want to put my clothes on, just left my coveralls on. Took a shower and cleaned up, and decided I'd better take a bathe [sic], too. And when I finally got out of the tub, I

was probably over my anger at having the stuff all over me and not really feeling like it was completely necessary. And then I got concerned. I remember being very concerned. And I thought that I should call someone.

Remember that the thing was blown up, the front office was completely demolished, and all of the people in the front office that you normally see from day to day when you're on daylight, they were housed in the Hughes Building in downtown Pampa, nine miles away from the plant. It finally kept getting bigger and bigger in my mind, that the people that should be concerned about this don't know anything about it.

I could justify, or at least believe in my own mind, that Mr. Elledge and Mr. McElliott were the only two [p. 30] people around, besides people that were driving up and down the road and happened to see the ash blowing – these were the only two people that knew anything about it. And I got more concerned when that idea hit me.

And it obviously took me from – I got off work at 4:00 o'clock – until 9:40 to get my nerve up to call someone. I can remember attempting to call Pam Shiflet. They had two personnel representatives, one of them was – How do you call it? – over, in charge of, the salaried people, and the other one was – took care of the hourly people. And I thought Ms. Shiflet was our hourly personnel representative, so I tried to call her.

I don't remember whether I couldn't find her number in the book, but I remember getting the feeling that it was an unlisted number. I found Ms. McBunch's phone number and called her to get Ms. Shiflet's phone number.

Q. So during this period of time – You got off work around 4:00 p.m., and from that point in time until about 9:40 p.m., the more you thought about what you had been doing during the course of day, the more concerned you became. Is that correct?

A. Yes.

Q. And part of your concern was the fact that, at least in your eyes, this fly ash, the dust, was going into the atmosphere; is that correct?

[p. 31] A. Yes.

Q. And would it be correct that part of your concern was the fact that you and your co-workers were having to work with this material and be exposed to it?

A. Part of the concern, yes, but my main concern was that I knew that we were required, at least by permit, to collect the ash, to keep it out of the atmosphere. And we had – They had collected it, but now we are methodically putting it back into the atmosphere.

Q. But you'd also said that during the course of the day, I believe it was, Kelly Freeman and Mr. Nickerson had expressed some concern to you. And my question is, when you called Jane McBunch that evening, was this part of your concern in notifying her or letting somebody know as to what was going on down there?

A. I don't remember mentioning at any time to her about exposure to myself or those people. The only concern that I got out was the ash into the atmosphere. Is that your question?

Q. No, my question is not just what you actually told her, but, if you will, part of your motivation in calling her. You'd said that Ms. Freeman and Mr. Nickerson were kind of looking to you, because you'd been there longer, to be a spokesman for the group. My question is, was this part of your motivation in calling Ms. McBunch that [p. 32] evening?

A. I'm sure that it weighed to some extent.

Q. All right. Let's get back to your conversation with Ms. McBunch. What did you tell her?

A. I thought I had a real good rapport with her, and I think I started out the conversation trying to crack a little dry joke. I said, "What have you got to do to get in trouble with this company real good," and, you know, "Just try to find out how to report a" – I think to EPA or OSHA, the Evironmental [sic] – "an EPA violation." I didn't get the sentence out completely. She broke in in midsentence, which really got it out of context, and said, "Well, why don't you quit?"

Q. Let's stop right there, Mr. Keener. Didn't you, in fact, say to her, "What do you have to do to get fired around here"?

A. Yes, out of context.

Q. Okay. We'll get to the context later. But, in fact, that is what you said?

A. Comma.

Q. Comma, and then what was said?

A. "Why don't you quit." I was not allowed to finish my sentence, which actually got it way out of context. The

finished – you know, "What do you have to do to get fired around here," is "Report an EPA violation," didn't get out [p. 33] until she said, "Well, why don't you quit?" And I said, "Well, I was trying to crack a joke." I really thought she would understand that.

We had been – I was on the employee club board and sat around a table, and we kind of talked and bantered around back and forth on two or three different meetings. And I thought I had a good enough rapport with the lady that – I was in a little better mood, obviously, and I was ready to try to joke about it and to get something done in a lighthearted, diplomatic manner. And it went downhill quickly.

I probably didn't handle it very well after that. I was shocked, I must say.

Q. After she said, "Why don't you quit," what did you say?

A. I really – just fumbling with the words that "I don't intend to quit. That's not my idea." and I'm sure I stumbled and fumbled with them pretty well, because I was so shocked I'm not sure that I could carry on any type of intelligent conversation after that. I was so floored.

Q. Due to this feeling that you had, this shock and dismay as to what she said, are you able at this point in time to tell us what the rest of the conversation consisted of?

A. I, at some point in time, got into the conversation [p. 34] of what I had intended to call about, you know, just drop the initial things that turned out to be a very bad

joke, and told her what we were doing, as I pretty well told you, pretty well through the spiel.

Q. Excuse me. I'm going to interrupt you just briefly. And what you told her when you say you went through the spiel, you told her what you and the other employees on the crew had been doing that day in the bag house?

A. Yes.

Q. Okay.

A. And when I finished, I told her that I had – my main concern was that I had remembered seeing a film shortly before the plant blew up – When the plant blew up, I was on vacation. Roughly a month before that, I distinctly remember it was on a set of graveyard, 2:00 or 3:00 o'clock in the morning, they showed us a film about RCRA.

Q. And when you say RCRA, R-E-C-R-A? Is that what you're saying?

A. R-C-R-A.

Q. R-C-R-A.

A. Resource Conservation Recovery Act. I think it is the enforcement arm of the EPA.

Q. Okay. And you saw a film?

A. Yes. And they pointed out at the end of this film that I, as an employee, was responsible both for a fine and [p. 35] possibly – and/or possibly jail term for seeing a violation to the air, water or any type of emissions, let's

say, and not reporting it. And I had gotten really concerned about, you know, is this what I'm doing and do I remember this film correctly.

I was asking, "Do I have to report this to you? Who do I report it to? I know we're not doing it right." This I'm already convinced. "Now what do we do about it?" And she asked again, "Why don't you quit?" And I'm sure there was a long silence, because by this time I really don't know what to say. This is not going well. You know, my life is starting to flash before my eyes. My whole twenty-some-odd years, it's beginning to look like they're over.

So I asked her again, "Who do I report this to? I need to report it to someone. Are you the" – "Is my responsibility over when I report it to you?" She said again, "I think that you need to quit." And I'm telling her all this time that I – By that time I think I was probably irritated a little bit. By now – you know, maybe by now I'm starting to get my back up against the wall saying, "I'm not quitting. Whatever I do, I'm not going to quit." Right now I don't recall what else was said.

Q. During the course of the conversation, did you tell her that you would prefer not to quit, you'd prefer to be [p. 36] terminated so you could draw unemployment compensation?

A. No.

Q. Did you tell her that you would prefer not to quit and would prefer to be discharged because you thought it would help you find another job?

A. No.

Q. Did you tell her during the course of the conversation that if you were not discharged then that there would be an incident that would result in your discharge within four days?

A. No, definitely not.

Q. Anything similar to that?

A. I said something that taken out of context could be turned into that. Near the end of the conversation I remember telling her that if we didn't get some satisfaction, that after I went to work in the morning I was going to contact someone. I was going to get someone to tell me that I was no longer responsible. And I told her that.

And I can't remember exactly how it came out, but it was in so many words that I will – I'm going to pursue my idea of telling someone until in a few days you're probably going to have to fire me anyway. But I certainly didn't ask to be fired.

Q. During the course of the conversation with Ms. [p. 37] McBunch, did you describe to her the working conditions that you and the others on the crew were having to work in?

A. I think so, but I don't recall. I think I told her the story of the bag house.

Q. Did you describe to her, for example, that you all didn't have any rubber boots to wear?

A. I don't recall.

Q. You may have, but you don't recall?

A. I just don't recall it.

Q. Did you tell her anything about the type of respirators that you were wearing?

A. Probably. I was unhappy with the respirators since I had asked for – specifically for an R21 cannister.

Q. How long did the conversation with Ms. McBunch last?

A. 20 minutes.

Q. Was your wife on the line for that entire 20 minutes?

A. She was [sic] wasn't on the line. She was sitting next to me.

Q. So she was only hearing your end of the conversation?

A. Right.

Q. And she didn't hear anything Ms. McBunch said?

A. Right.

Q. Was she sitting there close to hear what you said for that entire 20 minutes?

A. Oh, yes.

[p. 38] Q. When you called Ms. McBunch, had you been drinking?

A. I had just finished a beer when I sat down and made the telephone call.

Q. Had you had more than one beer?

A. No.

Q. Had you had any other type of alcoholic beverage since leaving work at 4:00 p.m.?

A. No. She asked me if I had been drinking. I remember that. I told her "No."

Q. What time were you scheduled to report for work the following day?

A. 7:30.

Q. And did you report at 7:30?

A. Yes.

Q. Did you clock in?

A. No.

Q. Why?

A. We didn't have clocks.

Q. How did you register your reporting for work, or did you?

A. We filled out a time card.

Q. Did you actually begin working on July 14th?

A. No. I had left my car in the parking lot and started through the – About all that was left was a swinging gate that during pre-explosion was where the trucks went [p. 39] through. And I didn't actually get through the gate. Mr. McElliott stopped me and said we had to go over to the temporary offices.

Q. Is that Rick McElliott?

A. Yes.

Q. Did he tell you why you were going over to the office?

A. They were going to fire me.

Q. And did he tell you why?

A. No.

Q. Was anyone with him?

A. No.

Q. So Mr. McElliott alone met you as you were coming into the premises and escorted you to the office?

A. Yes.

Q. And whose office did you go to?

A. Ms. McBunch.

Q. This would have been shortly after 7:30 or around 7:30?

A. Oh, before, slightly before, a few minutes before 7:30.

Q. And we're talking about in the morning? This would be 7:30 a.m.?

A. A.m.

Q. Were you present, then, during the meeting in [p. 40] Ms. McBunch's office?

A. Yes.

Q. And who all was present?

A. Ms. McBunch, Mr. McElliott, and Mr. Elledge.

Q. Now, earlier you've described to us that Ms. McBunch was, in your eyes, the personnel manager, correct?

A. Yes.

Q. Mr. Elledge had been your supervisor the day before?

A. Yes.

Q. On June 13th?

A. Yes.

Q. And Mr. McElliott was a supervisor who was over Mr. Elledge?

A. Yes.

Q. Mr. Elledge was your supervisor on June 13th. Had he been your supervisor on any days prior to June 13?

A. Just while I'd been attached to 1-A for the amount of time I'd been there, seven, 10 days. I don't recall exactly how long.

Q. Who conducted this meeting?

A. Ms. McBunch.

Q. And was she the first person who said anything?

A. Yes.

Q. And what did she say?

A. Mentioned that I had called her – asked me had I [p. 41] called her the night before, and I said, "Yes." And, "Would you recap what you told me?" I said, "Well, Mr. McElliott has already told me you're going to fire me. Why should I waste my time recapping? You've already taken everything I said out of context already. Nothing I've said worked. What would you like me to say?"

She then told them what she thought – what she'd decided that I said. And I was –

Q. Excuse me. If we could just interrupt, at that point what was her version of what you had said the night before? What did she say?

A. That I had called her and asked her to fire me. That I remember distinctly. That I kept asking her to fire me. I had made some half-hearted excuse of fly ash in the atmosphere. She obviously didn't know what fly ash was. She kind of got that fouled up a little bit.

I can remember sitting there thinking there's got to be some irony in here someplace and I just can't find it yet. What else? I don't really – I don't recall anything more specific.

Q. That portion of your conversation the night before where you had told her that within at least a few days you were going to report this and would probably be fired, how did she characterize that portion of the conversation?

A. I'm sorry. Could you –

[p. 42] Q. The night before when you talked with Ms. McBunch, you did have some discussion with her regarding the fact that you were going to report this to somebody and that it would probably get you fired, right?

A. Yes.

Q. My question to you is, the next day, on June the 14th, how did she describe that portion of your conversation to Mr. McElliott and Mr. Elledge?

A. I don't remember touching on that part of it at all. you've got to kind of bear in mind my – after working in that ash my eyes were swelled up, they were tremendously bloodshot. They felt like two slits. I didn't feel very good. And after they'd already told me they were going to fire me, I probably wasn't in a very good mood anyway. I am just not remembering that conversation very well. To me it was already over with. I was fired.

I'm trying to figure out, you know, here I sit, I've got five weeks of vacation. I carried over two weeks of vacation from last year because they kept saying they needed help after the explosion, so I didn't take my two weeks of vacation I had left from last year. I'm sitting on seven weeks of vacation. We're talking approximately $4,000. If they run me out, how am I going to get that, you know. There were several things going through my mind while I'll [sic] trying to listen to what she's saying.

[p. 43] Q. So during the time that she was talking, these were the thoughts that you were having?

A. I had myself convinced that they were going to fire me, and as it turned out, I was right. There wasn't anything I could say.

Q. But these thoughts that you're describing for us today were the thoughts that you were having at that time?

A. At that time, yes.

Q. The night before, do you recall making the comment to Ms. McBunch that "shit happens"?

A. Did not at all that night.

Q. The next day, on June the 14th, do you recall her making any comment in that regard and attributing that statement to you?

A. I beg your pardon?

Q. On June the 14th when you were in this termination meeting with Ms. McBunch and Mr. McElliott and Mr. Elledge, did Ms. McBunch ever make the statement that you had told her the night before that, quote, shit happens, unquote?

A. Definitely not.

Q. Okay. How long did this meeting with Ms. McBunch and Mr. Elliott [sic] and Mr. Elledge – how long did that meeting on June the 14th last?

A. Five to 10 minutes.

[p. 44] Q. Were you given the opportunity to give your version of what had happened?

A. Not that I recall, but it's possible.

Q. How did the meeting conclude?

A. I was asked to go home. They would make their decision and call me. Around lunchtime, I'd say, they called me back to come back to the plant.

Q. Who called you? Do you recall?

A. I want to say Ms. McBunch, but I don't recall who actually called.

Q. And whoever it was who called, they called you at your home?

A. Yes.

Q. Did they say anything more to you at that time than simply "Come back to the plant"?

A. No, that was it.

Q. When you went back to the plant, what happened?

A. They had a – Ms. McBunch had a letter typed up lying on her desk and just went through what I assume to be basic formalities of terminating someone. I think – Either I read it or she read it to me. I don't remember that for sure.

Q. And was this a –

A. I was –

Q. – termination letter? Excuse me.

[p. 45] A. Yes. I was asked to sign it. And that was it. Less than five minutes.

Q. Did you sign it?

A. Yes.

Q. Who all was present?

A. Ms. McBunch, Mr. McElliott, and Mr. Elledge.

Q. During the course of your employment with Hoechst Celanese and prior to this incident, had you had any problems with management or supervision?

A. I'd had problems with Mr. McElliott before, yes.

Q. And what were those problems? Can you describe them?

A. Initially the one I remember kind of starting the thing was some outside readings. It had happened about six months, nine months later when it became appraisal time and all this stuff came out of the file and went onto my appraisal. I vaguely remembered the situation he was talking about, but I couldn't remember the particulars until I had a few days to think about it. By then it was all over.

He said that I had got up and just wrote down a set of readings, outside readings, without ever leaving the room. I was blank. I couldn't remember what to tell him at that particular time. As I thought back on it, I remember very well now that I had been out earlier actually doing my co-worker's job for him, setting up some stuff on

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FILED
JUL 7 1992
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No. 91-1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BERNARD KEENER,

Petitioner,

v.

HOECHST CELANESE CORPORATION a/k/a CELANESE PLASTICS COMPANY, a/k/a CELANESE PLASTICS COMPANY, a division of CELANESE CORPORATION f/k/a CELANESE CORPORATION AND HOECHST CELANESE CHEMICAL GROUP, INC. a/k/a CHEMICAL GROUP, f/k/a CELANESE CHEMICAL COMPANY, INC. a/k/a HOECHST CELANESE CHEMICAL COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:

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QUESTION PRESENTED

By concluding that Petitioner was arguably engaged in protected concerted activity within the exclusive jurisdiction of the NLRB, did the court of appeals decide a federal question in a way that conflicts with applicable decisions of this Court?

PARTIES

There are no parties to the proceeding other than those contained in the caption of the case in this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1983

BERNARD KEENER,

Petitioner,

v.

HOECHST CELANESE CORPORATION a/k/a CELANESE PLASTICS COMPANY, a/k/a CELANESE PLASTICS COMPANY, a division of CELANESE CORPORATION f/k/a CELANESE CORPORATION AND HOECHST CELANESE CHEMICAL GROUP, INC. a/k/a CHEMICAL GROUP, f/k/a CELANESE CHEMICAL COMPANY, INC. a/k/a HOECHST CELANESE CHEMICAL COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

Petitioner claims that he was discharged from his employment in retaliation for voicing concerns about working conditions. On the day in question, Plaintiff and several co-workers were required to remove and dispose of fly ash bags. Plaintiff testified in his deposition that he and several co-workers were concerned about their exposure to the fly ash and discussed these concerns among themselves. Because

of his longer tenure with the employer, Petitioner testified that his co-workers looked to him to bring the matter up with management. During the course of the day, Petitioner testified that he approached his supervisor several times, advised him that he and his co-workers were concerned about their working conditions and asked if conditions and procedures could be altered. Unable to obtain a satisfactory response from his supervisor, Petitioner later telephoned the employer's personnel manager and complained to her. The following day, Petitioner was discharged.

The district court concluded that Petitioner was arguably engaged in protected concerted activity and that the question of whether Plaintiff had in fact been discharged in retaliation for engaging in such conduct lay within the exclusive jurisdiction of the National Labor Relations Board. On appeal, the Fifth Circuit affirmed in an unpublished opinion.

Reasons for Denying the Writ

The decision of the court of appeals is consistent with applicable decisions of this Court.

Section 7 of the National Labor Relations Act protects not only employees' right to join labor organizations and engage in collective bargaining, § 7 also grants to employees the right "to engage in other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157.[1] Section 8 of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their § 7 rights. 29 U.S.C.

[1] Section 7 is set forth in relevant part at p. 3 of the Petition for Writ of Certiorari.

§ 158(a)(1).[2] Section 10 of the NLRA grants exclusive jurisdiction to the NLRB to hear and determine unfair labor practice cases under the Act. 29 U.S.C. § 160(a).[3]

It is not for the Court to determine whether Petitioner's activity was *in fact* protected concerted activity within the meaning of § 7. Under the statute, only the NLRB, subject to judicial review, may make such a determination. "We have often reaffirmed that the task of defining the scope of § 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it,' *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978), and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference, *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944)." *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829-30 (1984). If the Court determines that Petitioner's activity was *arguably* protected by the Act, then it must defer to the exclusive jurisdiction of the NLRB. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . " *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

"Arguably" does not mean that the party claiming preemption must conclusively establish that the NLRB *would* find a violation. Rather, "arguably" means only

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[2] Section 8 is set forth in relevant part at p. 3 of the Petition for Writ of Certiorari.

[3] Section 10 is set forth in relevant part at pp. 3-4 of the Petition for Writ of Certiorari.

that the party claiming preemption must advance a reasonable interpretation of the Act which has not been authoritatively rejected by the NLRB or the courts. "The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 395 (1986).

Applying these principles to the present case, it is clear that Petitioner was engaging in conduct which was at least *arguably* protected concerted activity under the Act.

In *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975), the Board held that a lone employee was engaged in protected concerted activity within the meaning of § 7 when he lodged a complaint under a safety statute designed for the protection of employees generally. The Board reasoned that inasmuch as safe working conditions were matters of concern to all employees, one employee acting alone to obtain statutory compliance would be presumed to be acting on behalf of all other employees. "Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted." *Id.* at 1000.

In *Meyers Indus., Inc.*, 268 N.L.R.B. 493 (1984), *remanded sub nom Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 474 U.S. 948, 971 (1985), the Board retreated from its *Alleluia Cushion* rationale, holding that there is no § 7 "concerted activity" when an employee makes a statutory safety complaint unless

he acts with or on the authority of other employees. "In general, to find an employee's activity to be 'concerted', we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Id.* at 497. On appeal, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Board to more fully explain its rationale in light of the Supreme Court decision in *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984). In essence, the District of Columbia Circuit was questioning whether there were not occasions when the activity of a single employee could constitute concerted activity within the meaning of § 7. On remand, the Board stated in relevant part: "There is nothing in the *Meyers I* definition that states that conduct engaged in by a single employee at one point in time can *never* constitute concerted activity within the meaning of Section 7. On the contrary, the *Meyers I* definition, in part, attempts to define *when* the act of a single employee is or is not 'concerted.' " *Meyers Indus., Inc.*, 281 N.L.R.B. 882, 885 (1986), *aff'd sub nom Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988). The Board then went on to discuss and explain its historic position that a single employee is engaged in concerted activity when he acts, formally or informally, as a spokesman for one or more other employees. *Id.* at 885-887.

In *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 this Court held that a lone employee's refusal to engage in what he considered to be an unsafe act was protected concerted activity where such refusal was arguably authorized by a collective bargaining agree-

ment. In so holding, this Court reiterated that while concerted activity clearly encompasses two or more employees working together at the same time and place toward a common goal, "the language of § 7 does not confine itself to such a narrow meaning." *Id.* at 831. Both the majority opinion and the dissent emphasized that a single employee acting alone may be engaged in protected concerted activity if he does so "as a representative of at least one other employee." *Id.* "An employee certainly engages in 'concerted activity' when he acts . . . on behalf of one or more . . . employees." *Id.* at 846 (O'Connor, J., Powell, J., and Rehnquist, J., dissenting).

In order for a single employee to act as a representative on behalf of other employees, it is not necessary that he be formally chosen or designated. A vague, unspoken understanding or awareness that one employee may take whatever action he deems appropriate is sufficient to deem that person as a spokesman for the group. *Meyers Indus., Inc.*, 281 N.L.R.B. at 886 (unnecessary for spokesman to be "specifically authorized" by group); *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1355 (3d Cir. 1969), *cert. denied*, 397 U.S. 935 (1970) ("spokesman may be a voluntary one or a chosen representative"); *NLRB v. Guernsey-Muskingum Elec. Coop., Inc.*, 285 F.2d 8, 12 (6th Cir. 1960) ("mere fact that the men did not formally choose a spokesman . . . does not negative concert of action"); *Walter Brucker & Co., Inc.*, 273 N.L.R.B. 1306 (1984) ("specific authorization" of spokesman unnecessary, where more senior employee volunteered to approach management and junior employee was only generally aware that senior employee would take whatever action he deemed necessary).

When Petitioner elected to act not only on his own behalf, but also as a spokesman for his co-workers, he elevated his conduct to a plane beyond local state interest. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. at 245.[4] Moreover, Petitioner is clearly in error when he argues that protected concerted activity is a mere peripheral concern of the NLRA. Indeed, protection of the right to engage in concerted activity for mutual aid or protection has been described by this Court as one of "the most fundamental purposes of the Act." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 261 (1975). In *Weingarten*, this Court pointed out that § 1 of the NLRA "declares that it is a goal of national labor policy to protect" and foster this right. *Id.* at 261-62. This Court has repeatedly emphasized that "Congress knew well enough that labor's cause is often advanced on fronts other than collective bargaining" and, consequently, fashioned § 7 to protect

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[4] Thus, Petitioner's reliance upon *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988) and *Jones v. Roadway Express, Inc.*, 931 F.2d 1086 (5th Cir. 1991) is misplaced. Both *Paige* and *Jones* involved the question of contractual preemption under § 301 of the Act, 29 U.S.C. § 185. In this regard, *see Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). More appropriate to the case *sub judice* is the recent decision of the United States Court of Appeals for the Eighth Circuit which held that an employee's safety claim under state law is preempted if it arguably falls within the exclusive jurisdiction of the NLRB. *Platt v. Jack Cooper Transp. Co., Inc.*, 959 F.2d 91 (8th Cir. 1992).

concerted activities not only for collective bargaining but also for the broader purpose of "mutual aid or protection." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). To limit the protection of § 7, as Petitioner suggests, to rights associated with union representation or collective bargaining would "frustrate the policy of the Act to protect the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

Conclusion

Assume, for the purposes of argument, that Plaintiff and his co-workers had concertedly walked off the job in protest of their working conditions. Let us assume further that they were summarily discharged for engaging in such conduct. Clearly, the Court would have little difficulty in concluding that the conduct in question was protected concerted activity within the exclusive jurisdiction of the NLRB. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). It matters not that the concerted activity in this case took a different form, *i.e.* Petitioner acting alone as a representative on behalf of his co-workers who looked to him to bring the matter up with management.

Where, as here, the activity in question arguably is protected by § 7, resolution of the issue and the fashioning of the appropriate remedy should be deferred to the NLRB, the agency established by Congress for this express purpose. "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the ex-

clusive federal regulatory scheme." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. at 247.

The district court and the court of appeals correctly concluded that Petitioner was *arguably* engaged in protected concerted activity and that the question of whether Petitioner had *in fact* been discharged for engaging in such conduct lay within the exclusive jurisdiction of the NLRB. In so deciding, the lower courts did not decide a federal question in a way that conflicts with applicable decisions of this Court. Consequently, the petition for writ of certiorari should be denied.

Respectfully submitted,

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